Supreme Court, U.S.
FILED
FEB 4 1997
CLERK

No. 96-900

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

T. M. VISWANATHAN,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Thomas J. Ziko*
Special Deputy Attorney General

Celia Grasty Jones
Associate Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7387

*Counsel of Record

QUESTIONS PRESENTED

1. Are the lower courts' rulings consistent with this Court's precedent concerning the threshold showing necessary to state a legally sufficient claim for retaliatory discharge under 42 U.S.C. § 1983?

2. Are the lower courts' rulings consistent with this Court's precedent concerning the nature of property and liberty interests accorded Fourteenth Amendment due process protections under 42 U.S.C. § 1983?

This page intentionally left blank.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED 3

I. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE THRESHOLD SHOWING NECESSARY TO STATE A LEGALLY SUFFICIENT CLAIM FOR RETALIATORY DISCHARGE UNDER 42 U.S.C. § 1983. 3

II. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE NATURE OF PROPERTY AND LIBERTY INTERESTS ACCORDED FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS UNDER 42 U.S.C. § 1983. 6

A. No Protected Property Right In Continued Employment Was Implicated In Petitioner's Non-Renewal. 7

B. No Protected Liberty Interest Was Implicated In Petitioner's Non-Renewal. 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Arvinger v. Mayor & City Council of Baltimore, 862 F.2d 75 (4th Cir. 1988), *appeal after remand*, 894 F.2d 401 (4th Cir. 1990) 4

Board of Regents v. Roth, 408 U.S. 564 (1972) 6, 7, 8, 9

Bone v. City of Lafayette, 763 F.2d 295 (7th Cir. 1985) 9

Clark v. Link, 855 F.2d 156 (4th Cir. 1988) 8

Cleveland v. Loudermill, 470 U.S. 532 (1985) 8

Connick v. Myers, 461 U.S. 138 (1983) 3, 4, 5

Gryger v. Burke, 334 U.S. 728 (1948) 8

Holland v. Rimmer, 25 F.3d 1251 (4th Cir. 1994) . . . 3

Joyner v. Lancaster, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830, 108 S. Ct. 102, 98 L. Ed. 2d 62 (1987) 4

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967) 5

Kilcoyne v. Morgan, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) 7

Lawson v. Sheriff of Tippecanoe County, 725 F.2d 1136 (7th Cir. 1984) 9

Meyer v. State of Nebraska, 262 U.S. 390 (1922) . . . 5

Paul v. Davis, 424 U.S. 693, *rehg denied*, 425 U.S. 985 (1976) 9

Pressman v. UNC-Charlotte, 78 N.C. App. 296, 337 S.E.2d 644 (1985), *cert. granted*, 315 N.C. 589, 341 S.E.2d 28 (1986) 7

Riccio v. County of Fairfax, 907 F.2d 1459 (4th Cir. 1990) 8

Siegert v. Gilley, 500 U.S. 226 (1991) 9

Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1992) 5

Sweezy v. State of New Hampshire, 354 U.S. 234 (1957) 5

Tenkasi M. Viswanathan v. The University of North Carolina Board of Governors et al., 1:94CV528 2

T.M. Viswanathan v. Board of Governors of The University of North Carolina et al., 95 F.3d 43 (1996) 2

Williams v. Alabama State University, 102 F.3d 1179 (11th Cir. 1997) 5

STATUTES

28 U.S.C. §1254(1) 2

42 U.S.C. § 1983 . . . . . *passim*

No. 96-900

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

T. M. VISWANATHAN,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Respondents Board of Governors of The University of North Carolina (UNC) *et al.*, the Honorable Michael F. Easley, Attorney General of North Carolina, and Thomas J. Ziko, Special Deputy Attorney General, request this Court to deny the PETITION FOR WRIT OF CERTIORARI filed by petitioner T. M. Viswanathan, which was placed on the docket on December 5, 1996. Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit, entered on

September 3, 1996, which affirmed *per curiam* the March 1, 1996 decision of the United States District Court for the Middle District of North Carolina granting Respondents' motion to dismiss Petitioner's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This brief in opposition to the Petition is timely, for pursuant to Rule 30.4 Respondents sought from the Clerk, and received by letter of January 3, 1997, an extension of the time allowed to respond, to and including February 4, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *T.M. Viswanathan v. Board of Governors of The University of North Carolina et al.*, 95 F.3d 43 (1996), is unpublished. A copy of the slip opinion is found in Petitioner's Appendix (Pet. App.) at pp. 1-3.

The memorandum opinion of the United States District Court for the Middle District of North Carolina, Durham Division, *Tenkasi M. Viswanathan v. The University of North Carolina Board of Governors et al.*, 1:94CV528, is unpublished. A copy of the memorandum opinion and order appears in Pet. App. at pp. 5-26.

JURISDICTION

Petitioner seeks jurisdiction of this Court to review the Court of Appeals' decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment I; United States Constitution Amendment XIV; 42 U.S.C. § 1983

STATEMENT OF THE CASE

The essential facts of this matter are adequately summarized in the District Court's memorandum opinion (Pet. App. pp. 7-12).

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE THRESHOLD SHOWING NECESSARY TO STATE A LEGALLY SUFFICIENT CLAIM FOR RETALIATORY DISCHARGE UNDER 42 U.S.C. § 1983.

The District Court correctly held, and the Fourth Circuit Court of Appeals correctly affirmed, that Petitioner failed to satisfy the threshold showing this Court has held is necessary to state a valid claim for alleged retaliatory discharge in violation of the First Amendment: that the content, form and context of Petitioner's statements showed that he spoke on "matters of legitimate public concern." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Holland v. Rimmer*, 25 F.3d 1251, 1255 (4th Cir. 1994). Applying *Connick v. Myers*, the District Court found that the speech Petitioner claimed resulted in the non-renewal of his one-year teaching contract did not, as

non-renewal of his one-year teaching contract did not, as a matter of law, rise to the level of genuine public concern accorded First Amendment protection under 42 U.S.C. § 1983. (Pet. App. p. 18) Accordingly, the dismissal of Petitioner's retaliatory discharge claim was fully in accord with this Court's relevant precedent.

Petitioner claimed that Fayetteville State University (FSU) did not renew his teaching contract because "[i]n the early fall of 1989, [he] made statements at several meetings of the faculty which were quite critical of the academic administration at FSU," and "[o]n December 4, 1989, at a faculty meeting with the Chancellor, [h]e publically [*sic*] criticized Dr. Monroe [then FSU Vice Chancellor for Academic Affairs] for failing to emphasize publication and research." (Petition p. 13) As the District Court observed, this Court long ago established that comments of the type Petitioner made, which are complaints of personal grievances arising from employment, are not matters of genuine concern to the public community such as are entitled to constitutional protection. (Pet. App. p. 19, citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)). *See also Arvinger v. Mayor & City Council of Baltimore,* 862 F.2d 75, 79 (4th Cir. 1988), *appeal after remand,* 894 F.2d 401 (4th Cir. 1990); *Joyner v. Lancaster,* 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987). (contrasting protected "public-spirited" speech with speech in the interests of the speaker). Petitioner's rhetoric extolling the sanctity of academic freedom notwithstanding, he failed to carry his essential burden under 42 U.S.C. § 1983 to allege and show that his critical remarks transcended the bounds

and concerns of his employment setting and his personal relationship to it. *See, e.g., Stroman v. Colleton County School District,* 981 F.2d 152, 156 (4th Cir. 1992); *Williams v. Alabama State University,* 102 F.3d 1179, 1183 (11th Cir. 1997). Whether Petitioner made this showing was a matter of law for the District Court to decide. *Connick v. Myers*, 461 U.S. at 147-48 n.7.

The decisions of this Court that Petitioner claims are contrary to the District Court's holding are completely inapposite to the legal claim Petitioner himself set forth in his complaint. (Petition pp. 21-25, citing *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957); *Meyer v. State of Nebraska*, 262 U.S. 390 (1922) (Frankfurter, J., concurring)). Each of these decisions dealt with the issue of the bounds of permissible governmental regulation in areas impinging on First Amendment freedoms, an issue that was not before the District Court.

Petitioner contends that the findings of two administrative bodies, the FSU Faculty Hearing and Reconsideration Committee and the UNC Board of Governors, "raise a presumption" that Petitioner's critical remarks satisfy the requirements of a cognizable First Amendment claim. (Pet. App. pp. 26-27) This contention is patently meritless. These state administrative bodies were neither guided nor constrained in their determinations by the standards applicable to a legal claim under 42 U.S.C. § 1983. In adjudicating Respondents' Rule 12(b)(6) motion, the District Court

considered as true all of the facts Petitioner pled (Pet. App. p. 7), including the facts Petitioner alleged in his complaint concerning these bodies' findings. To the extent those facts provided support relevant to the threshold showing Petitioner was required to make to survive the Rule 12(b)(6) motion, they are appropriately reflected in the District Court's opinion.

As the Court of Appeals affirmed, the District Court correctly applied the legal standards this Court has established for determining the viability of retaliatory discharge claims under 42 U.S.C. § 1983. Therefore, Respondents submit that this Court, in its discretion, should decline Petitioner's request for review.

II. THE LOWER COURTS' RULINGS ARE CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING THE NATURE OF PROPERTY AND LIBERTY INTERESTS ACCORDED FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS UNDER 42 U.S.C. § 1983.

Under the governing principles of Section 1983 jurisprudence that this Court has established, the viability of Petitioner's claim that FSU deprived him of constitutionally mandated due process in declining to renew his contract depends on the deprivation of a constitutionally protected property or liberty right in his employment at FSU. *E.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). These principles, set forth principally in *Board of Regents v. Roth*, determined the District Court's holding that Petitioner's non-renewal did

not deprive him of either a protected property right or a protected liberty right. (Pet. App. pp. 15-18) The District Court could not have held otherwise, consistent with this Court's relevant precedent.

A. No Protected Property Right In Continued Employment Was Implicated In Petitioner's Non-Renewal.

Petitioner's employment situation at FSU was precisely the situation of the assistant professor David Roth in *Board of Regents v. Roth*, *supra*. Like Roth, Petitioner was non-tenured and served on a one-year term contract (Pet. App. p. 16) that his university employer chose not to renew. Petitioner's contract, like Roth's, contained no guarantees of renewal. Thus, like Roth, Petitioner had no constitutionally protected property interest in re-employment, for Petitioner's interest in employment at FSU was created and defined by the terms of a contract that supported "absolutely no possible claim of entitlement to re-employment." *Board of Regents v. Roth*, 408 U.S. at 577-78. *See also Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) (it is well-established that faculty members with terminal contracts have no property rights to continued employment that are entitled to due process protection). *Accord Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 302-03, 337 S.E.2d 644, 648-49 (1985), *cert. granted*, 315 N.C. 589, 341 S.E.2d 28 (1986).

Petitioner had an advantage Roth did not, for FSU's Tenure Regulations afforded him access to a three-level post-termination appeal process. It is certain

alleged delays in the conduct of that process that Petitioner contends constituted violations of his due process rights under the Fourteenth Amendment. (Petition pp. 28-30) Certainly, *where an entitlement to Fourteenth Amendment procedural due process exists*, at some point a delay in conducting a post-termination hearing would become a constitutional violation. *Cleveland v. Loudermill*, 470 U.S. 532, 547 (1985) (discussing claim of discharged employee who had property right in continuation of employment by virtue of state law which provided he could be terminated only for just cause). When the employee has no property right in continued employment, however, he has neither a constitutional entitlement to any sort of hearing nor a legal claim for deprivation of Fourteenth Amendment due process arising from an alleged violation of the procedures established by state law or regulation for the conduct of any hearing he may be afforded. *Board of Regents v. Roth*, 408 U.S. at 578; *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Clark v. Link*, 855 F.2d 156, 163 (4th Cir. 1988); *Riccio v. County of Fairfax*, 907 F.2d 1459, 1466 (4th Cir. 1990). Therefore, as the District Court and the Court of Appeals affirmed, as a matter of well-established law Petitioner has no basis for his claim that the non-renewal of his contract deprived him of Fourteenth Amendment due process rights.

B. No Protected Liberty Interest Was Implicated In Petitioner's Non-Renewal.

On the basis of the principles articulated in *Board of Regents v. Roth*, the District Court properly held that FSU's decision not to reappoint Petitioner to a second

one-year contract did not implicate any liberty interest protected by the Fourteenth Amendment. (Pet. App. pp. 16-17) In this respect, as well as in their employment status, Petitioner and David Roth were similarly situated. Like Roth, Petitioner did not claim that his non-renewal so stigmatized him that his freedom to take advantage of other employment opportunities was foreclosed. (Pet. App pp. 16-17) *Board of Regents v. Roth*, 408 U.S. at 573-74. In fact, the complaint disclosed that Petitioner has obtained other employment since the termination of his employment with FSU. (Pet. App. p. 17)

Although Petitioner claimed that his professional reputation was "put in jeopardy" when he was not rehired (Pet. App. p. 17), as with Roth there was no claim that FSU based the non-renewal of Petitioner's contract on charges that might seriously damage his standing and associations in the community. (Pet. App. p. 17) *Board of Regents v. Roth*, 408 U.S. at 573. The law is clear that, without such charges, injury to one's reputation is not a constitutionally protected interest. *Paul v. Davis*, 424 U.S. 693, 701, *reh'g denied*, 425 U.S. 985 (1976). As the District Court observed, any damages Petitioner may have sustained flowing from injury to reputation are properly recoverable under the common law of libel and slander. *Siegert v. Gilley*, 500 U.S. 226, 234 (1991).

The District Court's holding is consistent not only with this Court's precedent but with the federal appeals court decisions Petitioner contends conflict with it. (Petition pp. 4-5, citing *Bone v. City of Lafayette*, 763 F.2d 295, 298 (7th Cir. 1985); *Lawson v. Sheriff of*

Tippecanoe County, 725 F.2d 1136, 1138 (7th Cir. 1984)). These decisions expound the principle that, even where a person has no property right in his continued employment, defamation by his employer in the course of terminating that employment may work to deprive him of a liberty interest in due process sufficient to support an action under 42 U.S.C. § 1983. As the District Court noted, however, Petitioner has made no allegation of defamation by any FSU official in the course of the non-renewal of his contract. (Pet. App. pp. 16-17) Nothing in the District Court's opinion conflicts with these decisions, nor do they support Petitioner's due process claim in any respect.

Petitioner has not shown that the District Court and Court of Appeals decisions from which he appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court. In fact, as Respondents have shown, the decisions appealed from are fully consistent with this Court's precedent pertinent to Petitioner's claims. Therefore, the Petition does not merit this Court's grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should decline the petition for certiorari.

MICHAEL F. EASLEY
ATTORNEY GENERAL

Thomas J. Ziko*
Special Deputy Attorney General

Celia Grasty Jones
Associate Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7387

February 4, 1997

*Counsel of Record